us for not having made findings of fact. I doubt if they take anything out of that opinion. They might read it, but they will take the findings of fact and conclusions of law as I see them. That is what they will do.

You will find over and over again that they have criticized our trial courts because we have not made findings of fact, and they have had to look to opinions for that very reason. They want us to be precise in what we find.

Do you need to debate these questions of law very much? Could you let me have it in writing?

Mr. Gallagher: We could submit that. Could you possibly give us two days?

The Court: On the conclusions of law?

Mr. Gallagher: We want to see the new findings of fact as they now stand, so that we may make some comment on them. If we could have until—

The Court: I am going to hand this to Mr. Burling. I hope he can read my handwriting. I will give you a copy.

What I want to know is, Do you need any oral
3178 hearing on your conclusions of law?

Mr. Gallagher: I think we can submit those in writing.

The Court: If you do, I will give you an hour some day.

Mr. Gallagher: We are going to file a motion to reopen on the basis of newly discovered evidence.

The Court: You had better labor pretty hard as to why you could not get it before you tried the case.

Mr. Gallagher: We did not know the person knew the story.

Mr. Burling: May I inquire what the Court expects me to do?

The Court: What I should like to have you do, if you will, is to take this draft entitled, "Plaintiff's Proposed Amendments of Tentative Draft of Findings of Fact and Conclusions of Law," and rewrite it for me and for Mr. Gallagher—the complete findings as I have made them.

These are the only ones in controversy, so the others you can just go right along with.

Mr. Burling: I will not be able to until I get the transcript.

The Court: Well, you might. I think I have written in here with pencil the way I found them. If you cannot understand my handwriting, I will straighten it out.

We are going to give you a copy of it anyway, Mr. Gallagher.

3179 Mr. Gallagher: Could we have until the beginning of the week, in the light of the reporter's statement that the transcript will not be ready for two or three days?

The Court: Oh, yes; I am not going to sign it without giving you a copy. If you need another hour or two some day, I will give it to you.

Mr. Gallagher: Thank you very much.

The Court: I want to be perfectly fair about the matter, of course.

If you cannot spell it out from my handwriting, Mr. Burling, and you do not mind coming to me, I shall be glad to interpret it for you. I do not want to have to do this all over again unless I have gone completely astray on this, because I have, I think, settled all of the findings of fact. On the conclusions of law, if you need an oral hearing on them, I will try to find a couple of hours for you.

All right.

(At 3:50 p.m. the hearing was concluded.)

* * * * * *

3182 PROCEEDINGS

Mr. Baum: If Your Honor please, I would like to inform the Court that Mr. Burling is unable to be here, because he has left for Sweden to take depositions in the

Bosch case, and possibly will not be around for several months.

The Court: By the way, gentlemen, it just occurred to me. I noticed the other day that, inadvertently, in disposing of this matter, in my opinion I wrote that the judgment will be entered dismissing plaintiff's case. That is technically an incorrect statement. It ought to be, "Judgment will be entered finding for the defendant." I should have put it that way. I do not know how I overlooked that. So I am going to correct the opinion, but the important thing is to get the order right. I mean, the opinion does not control.

What is it we have this morning, gentlemen?

Mr. Gallagher: If Your Honor please, I believe you set this time down so that we might discuss the proposed conclusions of law, however, reminding Your Honor of the statement at our last meeting, namely, that Mr. Burling should prepare the findings in the light of the discussion that had taken place before Your Honor. We have no intention of going back into the findings of fact except to point out two changes, which we think are quite obvious on the face that I believe Mr. Baum won't have any objection to them.

3183 The Court: All right.

Mr. Gallagher: The first of these is with respect to findings 20 and 21, more specifically 21. There it is found that:

"Thereafter, plaintiff invested these funds in various corporations and other assets in the United States and elsewhere, including the property vested by the Alien Property Custodian."

As Your Honor will recollect, the record in this case disclosed that after the sale of the Opel shares, von Opel placed the proceeds in a number of varied stocks, which ultimately were put into Spur, Harvard—the vested prop-

erties—and others, and then in 1934 and in 1935 these shares were transferred to the plaintiff corporation, so the plaintiff corporation did not invest the funds from the Opel shares in the vested assets, but the vested assets in fact were transferred from the plaintiff corporation.

The Court: That is true, is it not, Mr. Baum?

Mr. Baum: I do not think that is quite true, Mr. Gallagher, because I think your own books show that as of 1932, when Fritz acquired the stock of Uebersee, or the end of 1931, whenever it was, he also had a credit on the books of the corporation for the entire value of the property which his father had given to him; so that whether he invested them personally, he was still doing it on

3184 behalf of the corporation.

The Court: The corporation had not been acquired then, had it?

Mr. Baum: Yes. It was acquired in the winter of 1931 or early 1932.

Mr. Gallagher: If you will recollect the chart, the funds were held by von Opel, in different accounts in New York and the only funds that were transferred to the corporation for which a credit was set up on the books for von Opel were for the purchase of the million dollars in gold. The other shares were held for von Opel, and it was not until 1934 and 1935 that he transferred these to the corporation and received a credit of some eleven million Swiss francs.

The Court: Let me ask you this. Look at 21. Why won't we get it by saying:

"Thereafter, these funds were invested"?

That is all you need. There is not any question that it came into the possession of the plaintiff before the vesting, and I think the findings will show that.

Mr. Baum: That is the only concern I had.

The Court: I think they do. I am sure they do.

"Thereafter, these funds were invested."

You can say, if you want to:

"Later, before the time of vesting by the Alien
3185 Property Custodian, they became the assets of plaintiff corporation."

Put it in there, if you want to.

Mr. Baum: If Your Honor please, I would like to call Your Honor's attention to Mr. von Opel's affidavit in the Gold case, which says:

"I left New York or or about June 5, 1932, returned to Switzerland; thereafter I got in touch by cablegram with Mr. Hoffacker with regard to the investments of Uebersee Finanz-Korporation A.G. in the United States."

I also would like to call your attention to the fact that the bank accounts were transferred to the name of Uebersee in May or June of 1932.

The Court: Put it in here. The only point I had in mind was, I supposed from the beginning, when he was given the power of attorney by his father, he had to go through the transaction of investing them through various corporations. I had the impression he had done that before they were transferred to Uebersee.

Mr. Gallagher: That is what the record indicates.

The Court: That was my impression. It does not make any difference. If they went to Uebersee before the vesting, these funds were invested in various corporations, including property vested by the Alien Property Cus-
3186 todian—

Mr. Gallagher: And subsequently transferred to the corporation.

The Court: Just say subsequently, but before vesting by the Alien Property Custodian.

Mr. Gallagher: You can make the date, "And prior to 1936," because it took place in 1934 and 1935. Put it back as far as that.

The Court: Subsequently, prior to 1936.

Would that get it? They were vested in 1941.

Mr. Gallagher: 1942.

The Court: Subsequently, prior to 1936—

Mr. Gallagher: Were transferred to the—

The Court: —these funds—

Mr. Gallagher: These assets or these shares.

The Court: Assets.

Mr. Gallagher: Assets.

The Court: —assets were transferred to the plaintiff. I have written it in here. I will give it to you. That gets it all right.

Mr. Gallagher: Yes, that is satisfactory.

We have one other suggestion, and that is all.

The Court: You said something about 20. What about that?

Mr. Gallagher: 20 related with 21, and we were contemplating making it one, but I think 20 can stand the
3187 way you have changed 21 now.

Now, the only other suggestion, because we do think it gives an inference which I believe the Court would not want drawn, because the record does not reflect it, is in the finding 53.

With respect to the last sentence thereof, it now reads:

"Plaintiff corporation on occasions paid the expenses of trips made by Wilhelm von Opel."

The day that we were in court, you stated that Mr. Burling should draft it to read—this is page 3174—

"Plaintiff corporation on occasions paid expenses for a trip to South America."

I then added at that point:

"and paid for shooting stag in Hungary."

The Court then said:

"You can dictate that. I will mark that.

"'Plaintiff corporation on occasions paid expenses'; and then I will say, 'dictated.'"

We would like it to read:

"Plaintiff corporation on occasions paid expenses for a trip to South America and paid for the shooting of a stag in Hungary. However, said expenses were charged to the account of Fritz von Opel."

We would like that sentence added, and, in support of that request, I refer you to Plaintiff's 147 for April,
3188 1937, which, you might recollect, we pointed out at that time—that the amount is charged to him.

The Court: What was this in? You do not have to put in all the details. How did you have it? "Plaintiff corporation"—

Mr. Gallagher: "paid for the expense of a trip made by Wilhelm von Opel."

The Court: All you need is, "paid the expenses of a trip to South America."

And what is the other one?

Mr. Gallagher: "and for the shooting of a stag in Hungary."

The Court: You do not need that.

Mr. Gallagher: All right. "paid the expenses of a trip to South America," period.

The Court: And Hungary.

Mr. Gallagher: And Hungary, all right.

The Court: "paid for a trip to South America and another trip to Hungary."

Mr. Gallagher: "vacation trip to Hungary." I would like the word in there, so it does not show he was going on business.

Mr. Baum: If Your Honor please, they are now getting

outside of the record. Nobody said over there it was a vacation.

3189 Mr. Gallagher: It was stated in the record that it was for the shooting of a stag.

Mr. Baum: It may have been business and a vacation as well.

The Court: Well, put what the record shows.

Mr. Baum: Mr. Gallagher, in reference to this Hungary business, is referring to a statement in the books of payments of expenses to Count Edelsheim in Hungary. There are at least 80 items in the books of Uebersee that were made to Count Edelsheim. If one is to Count Edelsheim, I think we might legitimately infer that all of them are.

Mr. Gallagher: I do not want to argue a point that has not at all been raised by defendants at this time, but I will state, to refresh his recollection, that Mrs. von Opel testified that in April of 1937, which is the date on which this advance to Edelsheim is credited, Edelsheim and von Opel went to Germany, and she met him at that time at Hamburg.

Now, in connection with the Hungary trip, there were only 509 Swiss francs advanced to Wilhelm von Opel, which is about $150, and that was brought out by Mr. Burling himself, and not by us, in the earlier portions of this case.

Those are the only suggestions that we have now at this time with respect to findings of fact.

The Court: This will get it, I think:

"Plaintiff corporation paid the expenses"—

3190 This was after the agreement of 1931? Is that it?

Mr. Baum: That is right.

The Court: "after the agreement."

It is 1931, is it?

Mr. Gallagher: That is when we acquired it. I think it is surplusage. I do not think you need it in here.

The Court: You want to tie it in.

Mr. Gallagher: All right; "after 1931."

The Court: I do not care whether you say 1931. You are talking about a usufructuary agreement, whenever it came into effect. After the usufructuary agreement came into effect.

Mr. Gallagher: Excuse me. I think you might better leave that language out, Your Honor, because the shooting of the stag took place back in 1934, and in your own findings you find that the usufructuary agreement came into being some time prior to June—

The Court: "After the usufructuary agreement was made."

Mr. Gallagher: "After the usufructuary agreement was made, or after October 5, 1931."

The Court: Now, this will give it:

"After the usufructuary agreement was made on October 5, 1931, plaintiff corporation paid the expenses of a trip to South America and a trip to Hungary made by Wilhelm von Opel, said expenses being later charged
3191 on the books."—Is it later?

Mr. Gallagher: "said expenses"—

The Court: "said expenses being paid on the books of plaintiff corporation to Fritz von Opel."

Mr. Gallagher: Yes, sir; I think that is correct. That is correct, isn't it, Mr. Baum?

Mr. Baum: I believe so, Your Honor.

The Court: Yes; I think that is all right.

Mr. Gallagher: I realize that Your Honor stated, at the time that we had our discussion about the tentative findings of fact, that you were reluctant, if it was feasible, to make any changes in the opinion as drafted. However, I would, with Your Honor's indulgence, like to point out several changes, some six or seven, which we feel are completely unsupported by the findings of fact which now have been arrived at.

I point first to page 7 of your opinion, and I point to the third line of that second paragraph, where you have the words "joint title."

I think Mr. Baum will agree with the fact that that should be deleted, and Your Honor has found to the contrary on your own findings.

The Court: Where is that?

Mr. Gallagher: Page 7.

Mr. Baum: Now, where is it contrary to the findings?

3192 Mr. Gallagher: He finds legal title is in Fritz von Opel.

Mr. Baum: And Wilhelm von Opel had in rem rights, which in our law is equivalent to some title. I think "joint title" is a short form of describing it.

The Court: I thought I took that bodily out of the testimony of one of the witnesses.

Mr. Gallagher: No, Your Honor. None of the experts testified to that. Your findings are to the contrary on that and as to what the experts all testified. There is no joint title in the usufructuary and in the owner. One has the legal title and the other has the beneficial ownership. Joint possession is what they get, not joint title.

Mr. Baum: It would be the equivalent, Your Honor, of an equitable title, under our law.

The Court: I knew that, but the testimony on the stand was that it was not exactly like our law. I remember that. I did not pick that out of the air, did I?

Mr. Baum: I do not think so, Your Honor.

The Court: I am positive there was some testimony on that.

Mr. Boland: Your Honor, I handled the legal end of it, as you will recall, and I know definitely the whole theory that I worked with on German and Swiss law was absolutely the fact that there was only one title, and

3193 that was Fritz von Opel, under a gift agreement.

The Court: I have some recollection that Dr.

Kronstein said they did not have any such thing as we have here—equitable title.

Mr. Gallagher: There is no such thing as equitable interest in German law, as I understand. I am sure that I did not hear Miss Schoch testify that there was such a thing as point title under a usufruct. She gives no indication to me that she did.

The Court: I do not remember, frankly, where I got it. I thought I got that out of the testimony.

Mr. Baum: If I may make a suggestion, Your Honor, which Mr. Gallagher may agree to, if you want to strike out the words "joint title" and put in "beneficial enjoyment"—

The Court: All right.

Mr. Gallagher: All we are trying to do is conform to your findings, Your Honor, and, frankly, there have been a number of questions asked us by other lawyers as to the opinion. We are trying to clarify it.

The Court: There is a beneficial enjoyment, isn't there?

Mr. Gallagher: There is a beneficial interest in the usufructuary after it has been established, yes, sir.

The Court: That is what I say.

Mr. Gallagher: But that is not joint title under
3194 German law. Under German law, the whole title is in the legal owner.

The Court: All right. We will make it "beneficial interest."

Mr. Gallagher: How would that line read, then?

"Beneficial interest and the right to co-possession"—

The Court: Beneficial interest. If they have beneficial interest, they have a right. A beneficial interest is a right to demand that. That is a beneficial interest.

Mr. Gallagher: I think we might clarify it, Your Honor. You followed that in your finding 52, and you followed that

in your opinion, except that if you took this first joint title, which you are now calling beneficial interest, and you conformed it to finding (a) in 52, it would be in complete conformance with your finding of fact.

Mr. Baum: If Your Honor please, it just does not include (a). Mr. Gallagher is overlooking the first part of 52, which says, "An in rem right in property," which is not stated in the opinion.

The Court: I will tell you what I will do, if you want me to. I will substitute (a), (b), (c), (d), and (e) right in here.

Mr. Gallagher: Instead of that paragraph, then?

The Court: Oh, yes; that covers it.

3195 Mr. Gallagher: Yes, Your Honor.

The Court: Isn't that all right?

Mr. Baum: If you get also the first sentence of 52, which says they have an in rem right.

The Court: We have all of that.

Mr. Baum: That precedes (a).

Mr. Gallagher: All of 52 would be his opinion.

The Court: Just say, "Under German law," and then copy 52.

Mr. Gallagher: That is satisfactory, because that conforms, then, with your finding, Your Honor.

The Court: Now, I want to leave some of that in. Then I take up other rights created by the terms.

Mr. Gallagher: That is where you would strike, in other words, from the first start of the sentence down to "other rights," and you would continue on, as I see it.

The Court: That is all right. I will insert, "under German law, copy 52," and then—

Mr. Gallagher: Pick up at "other rights"?

The Court: And then the words "other rights." That stays in. All right.

Mr. Gallagher: Now, the next suggested strike is on

page 8, in paragraph 1, the third line thereof. You found that:

"Wilhelm and Marta von Opel and their daughter,
3196 Mrs. Elinor Sachs, were citizens of Germany and 'enemies', as defined by the Trading with the Enemy Act."

Your finding of fact is to the contrary. She is a resident of Switzerland and as such not an enemy within the definitions of the Trading with the Enemy Act. We feel that the sister should be stricken out of that paragraph to conform with your findings.

Mr. Baum: She may still be a citizen of Germany. She probably is.

Mr. Gallagher: Yes, but she is a resident of Switzerland.

Mr. Baum: I agree she is not an enemy under the Act; I agree.

Mr. Gallagher: I think she should be stricken from that line.

The Court: Where is that?

Mr. Gallagher: The second and third line of this paragraph here (indicating), "and their daughter, Mrs. Elinor Sachs." If you strike that much out, you would conform with your findings.

The Court: Where is that?

Mr Gallagher: Page 8.

Mr. Baum: If Your Honor please, I would suggest you do it another way. Why not do it before the words
3197 "and enemies" and why not insert "Wilhelm and Marta von Opel"?

Mr. Gallagher: I am striking their daughter, Mrs. Elinor Sachs.

Mr. Baum: That takes out the fact that she is a citizen of Germany.

The Court: We can put another paragraph in as to her.

"At all times involved in this suit, Wilhelm and Marta von Opel were citizens of German."

What do you want in there now?

Mr. Gallagher: "Were citizens of Germany."

The Court: What do you want to say about Elinor Sachs? She was a native of Germany living in Switzerland?

Mr. Baum: That is correct, Your Honor.

Mr. Gallagher: I would like you to add that the record is barren of any evidence as to what citizenship she does have.

Mr Baum: Nobody has proven to the contrary.

Mr. Gallagher: All right. Leave it that way.

The Court: "Their daughter, Mrs. Elinor Sachs"—Do you know how long it has been since she has been there?

Mr. Gallagher: Your Honor, I frankly do not think there is anything in the record to indicate. Even Mr. von Opel does not know how many years, but a long period of time. He does not communicate with her, it is my understanding.

The Court: "Native of Germany, presently re-
3198 siding in Switzerland."

All right.

Mr. Gallagher: Then, on page 9, sixth and seventh lines of that second paragraph, where you say, "It seems to me the usufructuary interests of Wilhelm and Marta von Opel and the contingent interests which they, their daughter or her issue, all alien enemies."

That should be changed.

The Court: You can just cut that out there.

Mr. Baum: You mean the words, "their daughter or her issue"?

Mr. Gallagher: If you strike out "their daughter or her issue," that would take care of it, and change the word "all" to "both," to read a little better.

The Court: Just say "alien enemies."

Mr. Gallagher: Strike the phrase, "their daughter or her issue."

The Court: "Alien enemies."

I do not know whether you need "alien enemies" in there at that point.

Mr. Gallagher: It does not hurt.

The Court: It seems to me it is really a little better to cut out the words "all alien enemies," and leave the others in.

Mr. Baum: It really is a matter of style, I believe, rather than anything else.

The Court: Although I think that styling is a little better.

Mr. Baum: I think the record is clear—

The Court: You do not have to call them what they are.

Mr. Gallagher: But the contingent interest of the daughter, or her issue, being a resident of Switzerland, does not taint.

The Court: But a native might. I have always had in mind that a native, even resident somewhere else—

Mr. Gallagher: But the Act, if I may say so, is controlled by residence, not nativity.

The Court: Not on your taint proposition. It will probably help your point a little bit, to be perfectly frank with you. You and I will probably disagree on the proposition, but I think if she were the only one who had any interest in the property—she and her brother Fritz were the only ones who had any interest in the property—it might very well be that you could not spell out anything out of that; but when you show that the mother and father and brother, who has had all these affiliations with his country, and the daughter, who has had that, and who may, for all we know, return back there, that gives a little flavor to the taint—not much, but a little. Do you see? All those circumstances may be taken into account. Very frankly, that might give you a point.

Mr. Gallagher: All right, Your Honor.

The Court: Of course, I may be wrong about that. It may be that if they get into another country, whether they take out citizenship or not, that stops all taint. I frankly cannot see that. I believe if Hitler went over into Switzerland and held property, it would still be enemy taint, unless he became a citizen. It is hard to divest yourself from all that. That is what I had in mind.

Mr. Gallagher: All right.

The Court: Start out with "alien enemies." That helps. I will strike that out.

Mr. Gallagher: The next suggestion is on page 10, starting the sixth line, the sixth, seventh, and eighth.

In light of your finding 10, in light of the evidence that he spent only about 10 per cent of his time in Germany, I think that sentence that he had his roots firmly planted in Germany—firmly planted in that country—is not founded on the record.

The Court: What I am talking about when I say "roots" is devotion, and I am trying to tie into the proposition that a man who is born in a country and has ancestors there from time immemorial, and has made fortunes there, and has been, as you say, a leading light in his country,
3201 and a representative in Olympics and world affairs, has the most powerful rootage in the world. I frankly could not understand the man's turning against his country under those conditions. There is not any opprobrium attached to him as far as I am concerned. As far as I am concerned, I rather dislike a man who would do otherwise. That is what I am talking about when I say "his roots."

Mr. Gallagher: All right, Your Honor.

The Court: It may be that down here at the bottom—

Mr. Gallagher: That is what I am going to indicate.

Where you have "continued allegiance to," that is not in conformity with finding 10, which is interest in the welfare of and sympathy for Germany. We had quite a dis-

cussion on the word "allegiance" at the time of our last hearing.

Then, the next sentence, "I find beyond doubt his fealty at all times has been to his native country of Germany."

In other words, as you found, it should be substituted for that sentence and we think that you could add that and start in, after the words "naturalized citizen of Liechtenstein," and carry on with finding 10.

The Court: "I find beyond doubt"—

Mr. Gallagher: The sentence just before that.

The Court: "I find beyond doubt that he had a
3202 continued interest in the welfare of and sympathy for Germany."

Mr. Gallagher: I think if you were to start with the sixth line from the bottom of that paragraph, "Statements made by Fritz von Opel after 1939"—

The Court: "Statements" is the reason for it, but this will fit into 10 if I say:

"In technical form Fritz von Opel is a citizen of a neutral country, but I find beyond doubt that he had a continued interest in the welfare of and sympathy for Germany."

Mr. Gallagher: That is all right, Your Honor. Then you can strike the last clause in the preceding sentence.

The Court: Wait just a minute. "Copy from finding 10," I will mark that.

"That in 1939, when he became a naturalized citizen of Liechtenstein"—

Mr. Gallagher: "That between the time in 1939"—

The Court: These are acts performed.

"Then in 1939, when he became a naturalized citizen of Liechtenstein, and in 1941, when war was declared by the United States, he had"—

Mr. Gallagher: I think you can just put this whole thing in there (indicating).

The Court: When I put these words "he had" in here, I simply mean it is to be copied in this way, but not
3203 when you rewrite this. You do not bother this page at all.

Mr. Gallagher: You are not changing the finding of fact at all?

The Court: I am not changing the finding of fact, but in order to make that read smoothly, I say, "Copy finding that in 1939 he had—"

Mr. Gallagher: Your Honor, I suggest we need the words "between the time" in there, not to segregate 1939 and 1941, because the statements were not made in 1941.

The Court: You want to say—

Mr. Gallagher: "Between the time."

The Court: "Between the time" does not have any significance. "Between 1939."

Do not rewrite it, but that is inserted as changed in pencil.

Mr. Gallagher: One other change in the line before, "indicate a continued allegiance." That should be changed "interest." As a matter of fact, you could strike that phrase there.

The Court: No.

Mr. Gallagher: Leave it like that and put the word "interest" there.

The Court: Oh, I see what you mean. "Statements made." We can copy the finding.

Mr. Gallagher: Copy the finding.

3204 The Court: Copy page 10.

Mr. Baum: Your Honor, that takes out your statement that he was in technical form a citizen of Liechenstein, and I think we are entitled to have that in, and I think it is important to you as well.

The Court: I guess that is right. The statements made are not so very important. We will let that stand as it is

here. That is a little better reasoning, but we will strike this whole paragraph out.

That is what you wanted, is it not?

Mr. Gallagher: You are going to let it read, "In technical form Fritz von Opel is a citizen of a neutral country, but I find beyond a doubt that"—

The Court: "That between 1939 and 1941"—

Mr. Gallagher: "When he became a naturalized citizen, he had a continued interest"?

The Court: Yes. This shows what is meant.

Mr. Gallagher: That clarifies it.

You have stricken that preceding sentence?

The Court: Yes, entirely.

Mr. Gallagher: Now, page 11 of the opinion, starting the end of the fifth line.

You have the line in there, "There is evidence tending to show."

Before that line, "Before the war, it is clear the 3205 output was shipped to Germany," is what you say.

I submit, Your Honor, that that is not correct. I refer Mr. Baum to record pages 2442 and 2443, wherein it was testified that a total of about 2,000 tons—slightly less than 2,000 tons—of bauxite was the output of the mines to von Opel's own knowledge; that of this amount 1,000 tons were sold in 1936 to the Hungarian Bauxite Trust; that subsequently the remaining portion—

The Court: What do you say?

Mr. Gallagher: That a part of the output—

Mr. Baum: Where is there evidence that only part of the output was shipped?

Mr. Gallagher: If you will read 2442 and 2443.

Mr. Baum: Is that Mr. von Opel's testimony?

Mr. Gallagher: That is Mr. von Opel's testimony.

Mr. Baum: Has he suddenly been endowed—

Mr. Gallagher: That is the only testimony.

Mr. Baum: Look at the defendant's exhibits which show where the output went—to the Giulini Brothers. The documents in evidence show a greater output than Mr. Gallagher is talking about, and that went to Giulini Brothers.

Mr. Gallagher: Less than a thousand tons, as of the time we are speaking of, in the '30s, before the war. There were 2,000 tons at that time. When you are talking about the war period, from the way the Judge has the
3206 language in here, you are apparently talking about two phases, before we go to war and before the others go to war, which would be the 1939 and the 1941 period.

The Court: I do not think it makes a terrible lot of difference, frankly. I did not intend to make any distinction between a claim that it was ever shipped and that it was not. I do not think there is any debate on that point.

Mr. Gallagher: Let us drop that and go to the next sentence:

"There is evidence tending to show also that Transdanubia shipped bauxite to Germany after declaration of war between Hungary and the United States."

There is no evidence now—

The Court: Before the war it was part of the output. Now, we have got that.

Mr. Gallagher: Now, the next sentence. After the United States and Hungary are at war—and there is no evidence in the record, as you will recollect from our last hearing, and from finding 31, that bauxite was shipped to Germany—after the declaration of war between Hungary and the United States—finding 31 sets forth what happens.

Mr. Baum: May I direct Your Honor's attention to Defendant's Exhibit 90-F, which says that 617 kilograms of bauxite were shipped to Giulini Brothers in December, 1941.

Mr. Gallagher: It has no date specification. As
3207 you will recollect, Your Honor, we showed that in October eighteen or nineteen hundred tons were

shipped; in November some eight or nine hundred tons were shipped; and by the time you get down to December you had approximately 600 tons shipped; with a falling off and from which we say the inference could be well drawn that there were no shipments after the 13th of December.

Mr. Baum: Mr. Gallagher is now testifying that all the shipping was in the first 12 days of December. There is no evidence of that.

Mr. Gallagher: The inference can be drawn, from the falling off of production and the fact that it is about one-third of the production in October, that that was the fact rather than the inference that it was taking place all during December. We have no evidence, anyhow, as to what happened.

The Court: You could say, "at and about the time of the declaration." That certainly was at and about.

Mr. Gallagher: That is all right: "At or about" rather than "after."

The Court: At or about December.

Mr. Gallagher: December 13 was when Hungary and the United States went to war.

The Court: "Shipped bauxite to Germany."

Maybe I had better put the dates, along in October, November, and December.

3208 Mr. Gallagher: October, November, and December, 1941. That will be in conformity with your finding, then.

The Court: "Shipped bauxite to Germany at or about" —just say "in December."

Mr. Baum: In your finding you said "during," Your Honor.

The Court: All right; "during December."

Mr. Gallagher: "During October, November, and December," was your finding.

The Court: "During December." As long as you do not say it is after.

* * * * * *

Mr. Gallagher: Yes, Your Honor.

The Court: "During December, 1941, which was at or about the time of the declaration of war between Hungary and the United States."

Mr. Baum: If Your Honor please, I do not know what Mr. Gallagher is attempting to do by whittling away at sentences of the opinion at a time.

The Court: What he did not want me to say was that I make a specific finding that it was after. I did not mean that. The way I recall it is that there was definite evidence that it went in there in December. Then I came to the conclusion lafer on, as you remember, that in so much as that condition existed and the parties who were on the witnes stand did not tell anything of any certain
3209 cessation of it, it is reasonable to assume that the corporation was carrying on that way.

Mr. Baum: Not only that, but in 1941 you find that they had a two-year contract to ship bauxite, until the end of 1942.

Mr. Gallagher: That is correct, but, at the same time, in our last hearing you stated to Mr. Burling, "Mr. Burling, it you have no other letters or orders showing any shipments after December, I can't find that there were any shipments."

That is the statement you made.

The Court: This opinion does not control, anyway. The Court of Appeals will read it, but they are going to have the facts here. I do not want to write anything in here that is inconsistent with anything here.

Mr. Baum: They are pulling out part of your finding and not the other part.

The Court: I did not mean to find that there was specific evidence here that the shipped it there afterwards.

Mr. Baum: It seems to me, Your Honor, it is not asking too great an inference if we prove shipments during December and a contract going for another year. Frankly, I do not see the need for burdening your opinion and restating finding 31.

The Court: The only thing is, if I am making a finding that is inconsistent with it, I should change that.

3210 I think I will let that go that way, "During December, which was at or about the time of the declaration of war."

You have that in there. This is not anything that is going to change this one way or the other.

Mr. Gallagher: The last suggested change on the opinion is the last sentence of that same paragraph, the last clause thereof, "which apparently supplied war materials to the enemies of the United States."

The Court: I think that is probably so. They say that is a conclusion, but if it is illogical, then the Court of Appeals can say so.

Mr. Gallagher: I won't press it, Your Honor.

The Court: Have you finished it?

Mr. Gallagher: Yes.

The Court: I am going to put at the bottom, "Judgment will be entered in favor of the defendant," instead of "dismissing plaintiff's suit."

All right.

Mr. Gallagher: In discussing the conclusions of law—and I will try to make this as brief as possible—I would like, with Your Honor's indulgence, to turn to conclusion 6 first. We have previously argued 5, and Your Honor has made up his mind on what constitutes enemy taint. We see no necessity for taking time to reargue number 5.

We would rather argue 6 or point out a suggested
3211 change, and then I would like to lump 2, 3, and 4 together for a brief suggestion.

In 6, in the light of what we were discussing on Transdanubia, the fourth line, "During World War II mined bauxite," is an affirmative statement and goes much farther than the findings.

Mr. Baum: World War includes from September, 1939.

Mr. Gallagher: But you have "for the benefit of an

enemy of the United States," and you do not become an enemy of the United States until the United States is at war.

Mr. Baum: All I can say is that this is a conclusion which the Judge is entitled to draw.

The Court: Is there any evidence that Hungary was doing that?

Mr. Baum: Hungary itself was an enemy.

The Court: All we have to do is say:

"Ownership of Transdanubia Bauxit, A.G., had mined bauxite for the benefit of Germany."

You do not have to say the time. Do not call them an enemy or anything else. It does not make any difference. You do not have to say the time.

Mr. Gallagher: There is nothing in the record to show that they mined bauxite for Germany after December, 1941.

The Court: I say, "which mined bauxite for the benefit of Germany." That is all I have got.

3212 Mr. Gallagher: At what time? Time becomes relevant.

The Court: The findings of fact are in here.

Mr. Gallagher: You are just going to make that broad statement?

The Court: That is all. This is not any additional finding of fact. As a matter of fact, you could say:

"The circumstances of the acquisition of Fritz von Opel's Liechtenstein citizenship and his attachment to and sympathy for Germany and plaintiff's ownership of Transdanubia."

That would do it, but it makes a little smoother reading to say:

"Which mined bauxite for the benefit of Germany."

Your time element is in there. I do not want to add anything to what I have said before.

Mr. Gallagher: In the next to the last line in that paragraph, where you say, "With the evidence of ownership," are you talking about the same ownership as you do in number 2, where you say it is indirectly? In one it is indirectly owned.

The Court: Cut out "evidence," if you want to.

Mr. Gallagher: In finding 2 you say the plaintiff is indirectly owned.

The Court: The enemy we are talking about here is Wilhelm. That is the one you are talking about here, 3213, is it not?

Mr. Gallagher: The corporation is the one that owns the securities. That is neutral.

The Court: We are talking about Wilhelm, the father. There is not any question about that, is there?

Mr. Baum: No, sir.

The Court: I am certainly not finding the plaintiff corporation is an enemy alien.

Mr. Boland: Your Honor, it seems to me that it is going to present a problem on appeal where you find that legal title—

The Court: Vested securities, with the evidence of ownership control by Wilhelm and Marta von Opel.

Mr. Boland: On appeal we have a problem where we have already found that Fritz von Opel is the title holder or that Uebersee is the title holder of the stock, of all the assets. Fritz von Opel has full title to all shares of Uebersee. We have a conclusion of law that he owned these assets. It seems to me we are in conflict if the Government is going to take any advantage of that conclusion.

The Court: I have labored the point out in the opinion that they controlled it. I have labored the point out that there is a certain type of ownership in them.

Mr. Boland: That is why Mr. Gallagher asked you

the question, Are you talking about any direct
3214 ownership, as you are in conclusion 2?

The Court: I suppose they are writing this, but what I am talking about is the ownership of Marta and Wilhelm and their control. That is what I am talking about. If you want me to put their names in there, that is all right.

Mr. Boland: It is just that the word "ownership" does not connote any legal title as distinguished from Fritz.

The Court: I do not mean that. The ownership I am talking about is that interest that they have that we have been talking about—usufructuary.

Mr. Boland: As long as it is clearly understood.

The Court: Do you want to say "usufructuary ownership"?

Mr. Boland: I think that would improve it.

The Court: That is all the evidence—

Mr. Gallagher: "Evidence of usufructuary ownership."

The Court: I am not trying to add to anything that I have found by these conclusions.

Mr. Boland: You see, while we will be the same people arguing on appeal, I understand Mr. Baum and the others might not be.

The Court: The Court of Appeals would be a pretty poor group of Judges if they think that my conclusions of law make additional findings of fact. I am not doing that. That would be stupid of an appelate court to say that—to say that Judge Laws is finding some owner-
3215 ship he has not talked about before. It would be stupid. But if you want me to say "usufructuary"—

Mr. Boland: That will clear up the problem we have.

Mr. Baum: We object to that. It is very vague to say "usufructuary ownership."

The Court: I am going to leave "control" as it is.

Mr. Baum: I hoped you would.

The Court: I will tell you what we will do:

"The aforesaid ownership and control by Marta and Wilhelm von Opel."

That will do it. That will certainly get it:

What were the words I used?

Mr. Boland: "Aforesaid ownership and control by Marta and Wilhelm Von Opel."

The Court: "Ownership and control as aforesaid of the vested securities by Wilhelm and Marta von Opel, alien enemies."

Does that finish it up?

Mr. Gallagher: No, Your Honor. I would like to discuss, somewhat briefly, 2, 3, and 4, and I will group them all together.

2, 3, and 4 set up the elements which you also talk about in 5, which constitute taint, and are predicated on the finding of fact by Your Honor that Frankenberg was the agent of Wilhelm von Opel, and in finding 40 you
3216 stated correctly that the record is bare of any evidence that after 1940 Frankenberg exercised any control over the plaintiff, but you said the record was bare of any termination of said agency and that, from the evidence, the fact that Frankenberg during the thirties, you found, had exercised control, you were going to find by continuendo, and did as a finding of fact, that he still continued to be the agent until the time of vesting, and it would be because of that agency, which would continue from the time of the outbreak of the war until the time of vesting, that alien enemies Wilhelm and Marta would indirectly own and control, you find, this plaintiff corporation, and thereby constitute taint and bar the recovery by the corporation of the stock.

To state the one line again more succinctly, you have found by continuendo, subsequent to 1940, that because an individual, Frankenberg, was an agent and because

there is no affirmative showing of any termination of such agency, as a fact said agency continued until the time of vesting.

I might submit to Your Honor that I honestly believe your finding of continuendo and the agency continuing until the time of vesting is completely contrary to the rulings of the Supreme Court of the United States, in the Insurance Company v. Davis, in 95 U.S., at page 425, and I would like to state this sentence out of the opinion first, Your Honor—

The Court: Excuse me just a moment. Let me tell
3217 you this. I think you are limited a little bit on this, which makes quite a difference. When you create a usufructuary interest in a party, that usufructuary interest, I would certainly assume, continued even though the agency which set it up ceased to be active. In other words, if he has a custodian agency which vests interest in the party, he could stop his activities immediately, and you would still have that interest. Suppose then he had activities of control up to a certain time. You could stop your control. You could stop exercising your control through your agent for the time being, but not lose your right of control.

If you find anything in there contrary to that, then you might swing me around.

Mr. Gallagher: I find in here one statement first which I would like to state to you.

The Court: Let me tell you what I am talking about. suppose I have got to get a title in me or I do get a title in me by an act of an agent. Title vests in me then, does it not? In other words, the key is turned over to him. He has sole possession. The interest is in me. From that time forward let us say the agent did nothing. I would still have that interest. He could be inactive. He could be fired. I would still have the usufructuary interest, which would remain until it is divested by an overt act.

Now, that is point number 1.

3218 However, this agent, also, we find, goes on to a period of activity of five or six years or eight or nine years, or whatever it was, and then it just happens that I have not heard of any activity in the last year or two or three years. That does not take away from the principal his usufructuary ownership, and it does not take away the evidence of his control. That is what I mean.

If I have an agent for me right now and he does not happen to do anything for me for the last six or eight months, that does not mean that I have given up my ownership or interest and control.

Mr. Gallagher: That is correct, under a normal agency, but this case goes further than that.

The Court: I will hear you.

Mr. Baum: May I interrupt for one moment, Your Honor?

The Court: Yes.

Mr. Baum: I am a little bit amazed by what Mr. Gallagher is starting to do. We came in here today to discuss ostensibly the conclusions of law. Mr. Gallagher is discussing the findings of fact. You told him to put them in writing. He now walks in with a stack of cases which I have never heard of.

The Court: I do not think we are going to have too much trouble about them.

Mr. Baum: I hope not.

3219 The Court: If he had some Supreme Court case that shows I am wrong, I will give him that opportunity.

Mr. Baum: I hope you will give me an opportunity to answer it.

The Court: I think so.

I want you to bear in mind the point I have before you argue something that is different, because I do not think the Supreme Court has held anything to the contrary on the point I have in mind. Go ahead.

Mr. Gallagher: Your Honor has stated—and I think it points up the first sentence in the opinion—that because you see no actual acts of agency, that does not mean the agency has terminated; it is still in existence. I agree with that statement. That is the law.

The Court: You also agree with me that if you are an agent of mine, in setting up a type of ownership, and then you stop being my agent, that ownership will continue?

Mr. Gallagher: Oh, no, not the usufructuary ownership; no, absolutely not.

The Court: You mean if this agent died, then the usufructuary would abate until you got a successor, until you got another one?

Mr. Gallagher: As a right in rem, you would have to re-establish it.

Mr. Baum: That is not the law.

3220 The Court: You would have to prove that law to me. Your right in rem exists, under every law that was ever known. Your title vests in the thing itself and never moves out of it by some agent's dying or taking a trip away from it by going into another country.

Mr. Gallagher: The whole purpose of this so-called usufructuary interest—and the Government's contention as to the evidences of control—is that if the agency is not in existence and the stock is back with the legal titleholder, there is no control element without coming back and re-establishing it as a right in rem.

The Court: You have to get an overt act to do that.

Mr. Gallagher: The record shows stock is being held at the Adler Bank to the account of Frima since October, 1941.

I would like to discuss just this one question, and then be able to answer any questions.

The Court: Yes.

Mr. Gallagher: As Your Honor stated, you presumed the agency continues. I will discuss the facts briefly. I would like to read first one sentence from this decision:

"In some recent cases in certain of the state courts of last resort, for whose decisions we always entertain the highest respect, a different view has been taken; but we are unable to agree therein. In our judgment, the unqualified assumption on which those decisions are based
3221 —namely, 'once an agent, always an agent'; or, in other words, that an agency continued to exist notwithstanding the occurrence of war between the countries in which the principal and the agent respectively reside—is not correct."

Now, this case has been cited subsequently in Williams against Paine, in 169 U.S., and more recently, in 1924, in 297 Fed., a Second Circuit Court of Appeals opinion, the Second Russian Insurance Company case v. Miller, wherein that court cited the Insurance Company against Davis as the controlling authority.

I will just apprise you briefly of the background. I will read it from the syllabus. It states it more succinctly than I could:

"A resident of Virginia, who had been before the war a local agent of a northern insurance company, refused to receive the renewal premium, due December 28, 1861, tendered him upon a policy of insurance upon the life of a resident of that state. His refusal was based upon the ground that he had received no renewal receipts from the company, without which he could not receive the premium, and that the money, if received, would be liable to confiscation by the Confederate Government. The evidence further failed to show that the company had consented to his continuing to act as such
3222 agent during the war, or that he did so continue.

Held, that, waiving the consideration of any question in regard to the validity of an insurance upon the life of an alien enemy, such tender of payment did not bind the company."

Now, the Supreme Court went on to say—and I would like to read a few lines, because it sets forth the line followed in Williams against Paine and the Second Russian Insurance Company case—

"We deem it proper to consider more particularly the question of agency, and the alleged right of tendering premiums to an agent, during the war.

"That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often ascerted and explained in this court within the last 15 years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerant with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of
3223 absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it. In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto—the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision, or knowledge of what takes place, on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities, even

for the limited purpose beforementioned, unless continued by the mutual assent of the parties. It is not compulsory, nor can it be made so, on either side, to subserve the ends of third parties. If the agent continues to act as such, and is so acting, is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money, for the use
3224 of the principal, into the agent's hands; but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence; to whom he can communicate no instructions; and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy."

Now, we have, in addition to that finding continuendo an agency in Frankenberg, a violation of the naturalization laws, as evident from the loyalty oath required to be taken by him. We have a definite violation of Section 2 of the Trading with the Enemy Act, as to which the statute had not run prior to the amendments of the vested properties, and which were amended on the basis of the Gold case, setting up the agency in Frankenberg, because you will find, under your definitions, "To trade"—and this is now applicable in this case, because to trade, as we pointed out earlier in the trial, contrary to Mr. Burling, refers to Section 3—

3225 The Court: Did he testify in the Gold case?

Mr. Gallagher: No, sir; no affidavit from him in the Gold case.

In section 3 it is made unlawful and punishable by penitentiary sentence for any person in the United States to trade, and so forth.

When we get to the definition of "to trade," we find, under Section (c), "To enter into, to carry on, to complete, or perform any contract agreement or obligation."

The Court: I have not made any specific finding of agency.

Mr. Gallagher: If he is not the agent from 1941, there is nobody to exercise control over this corporation after the outbreak of war.

The Court: You mean the effect of that would be the outbreak of war would end—

Mr. Gallagher: Frankenberg's agency.

The Court: Wait a minute. Your argument was that the minute war broke out, and thereby ended Frankenberg's agency, the war in and of itself between the United States and Germany would end a man's usufructuary interest.

Mr. Gallagher: No. Here is what I say. I say the presumption that should be drawn by the outbreak of the war—in other words, revetsing the presumption of continuendo—

The Court: I do not care whether he was an agent
3226 after the war or not. My point is the usufructuary interest had been set up and it existed as of the time of the war and that the breaking out of the war between the two sovereigns would not kill this man's rights, according to the laws of Germany, which we now respect.

Mr. Gallagher: Your Honor, your findings are all set, and I am not discussing the findings. I am discussing the conclusions—that Frankenberg was exercising the right after the outbreak of war.

The Court: Did I say that?

Mr. Gallagher: Yes, back in the findings. That is not in the conclusions, but you have got the parents exercising the control in findings 2, 3, 4, and 5.

The Court: I still think so.

Mr. Gallagher: But they do it through Frankenberg, or do you say no?

The Court: I am going to let the record stay as it is, as far as the other control is concerned. I am not striking the other findings out. You can argue that to the Court of Appeals, but you will have argue this with me: I simply cannot see how the breaking out of war between Germany and the United States, which is an act of two sovereigns, could kill a usufructuary right on the part of Wilhelm and Marta von Opel.

Mr. Gallagher: Let us assume that the agency is
3227 terminated at the moment at the outbreak of war, because to hold otherwise would put Frankenberg in complete violation of Section 2. So the agency is terminated, because there is nothing to show that he has continued to act. Is that correct?

The Court: We will assume that for the argument.

Mr. Gallagher: We are back to the mother and father, and they had a usufructuary right set up by putting the shares in Frankenberg. The shares, in 1941 and subsequent thereto, are in the name of Frima. Number one. They are not in the name of Frankenberg. They are not held in Frankenberg. They are in the name of Frima. True, they are in the Adler Bank.

The Court: That is where you and I differ. This custody that was gone through for this tax appeal, in my judgment, did not break down the ownership.

Mr. Gallagher: Now, when the shares are back, Frankenberg is out. They were the people, you found, through whom he exercised control.

The Court: You get the shares out, whereas I do not.

Mr. Gallagher: They came back to the Swiss Bank.

The Court: It is all custody rather than possession.

Mr. Gallagher: We are looking at this thing from the question of control—

The Court: The way you are arguing, you are arguing a motion for rehearing.

3228 Mr. Gallagher: I am bringing to Your Honor's attention something that came to our attention the last few days.

The Court: As Mr. Baum said, this is really a motion for rehearing rather than findings, because, frankly, if I took that view, I would have to reverse my finding.

Mr. Gallagher: We wanted to raise this before. We wanted to give you an opportunity—

The Court: I appreciate that. I do not see how I can do it, on the findings of fact proposition. You see, I differed with you on your view about this passing out of the usufruct, and unless you can indicate to me that the German law is entirely different from the American law—the law in effect here—it will have to stay that way. Once you set up, through a valid agent, the usufructuary interest, even though the agent let it go over into Frima for some tax purpose, it did not indicate any relinquishment of the title or right of control, and therefore you are not having it pass out of the principal, so to speak.

Mr. Gallagher: A usufructuary interest.

The Court: That is right. It is not passing out, so it does not have to come back. That is where you and I differ. It does not pass out.

Mr. Gallagher: Here is where I would like you to bear with me. However, you have found, in your opinion, that it was through Frankenberg that the father was

3229 exercising control over the plaintiff, up to the time of the—

The Court: You are talking about a different thing. Control is one thing—

Mr. Gallagher: That is what I am basically directing my attention at—control.

The Court: There is nothing in here—

Mr. Gallagher: There is no possession in the father. That is with the bank. Your Honor, if I might submit that, just referring back to your findings—

The Court: What I find is that the possession of Frankenberg becomes the possession of the father and merges into that and it never goes out. That is what I am really in effect finding. Control is another point. That is a different point. What I am talking about control, it is a different kind of control. The control I am talking about is when he was bossing what happened over here through Frankenberg. That is a different kind of control. That might have ended with the war. You might be right on that, but I do not think you are right on the other proposition, on the proposition that the usufructuary interest comes to an end.

Suppose my wife or my brother or my friend has an interest in certain stock or securities and he lends it to me or lets me have custody of it for some transaction. He does not divest himself of ownership in it. You do
3230 not have to get it back to him then.

Mr. Gallagher: But on the important point of control, in findings 2, 3, and 4, you find that they had possession of the shares and you find that on a custodial basis, not actually. It is a custodial basis, and you find they exercised direction and control over such shares and the management, investment, use, and disposition of the property owned by plaintiff corporation, and the only pertinent time is December 7, 1941, until the time of vesting; and to support that sort of conclusion of law, the findings of fact, in your opinion, reflect that the person who was doing that exercising was Frankenberg, down to the time of vesting.

The Court: There are two forms of control that I am talking about. There are two forms. One of them exists by virtue of this usufructuary interest. That is number one. Now, that did not end, in my judgment.

I might grant that you are right on this other kind of control, by virtue of what the Supreme Court said, namely, that Frankenberg was over here bossing and telling them what to do. As you say, that might violate the Trading with the Enemy Act. I do not know whether it does or not. Let us say it does, though. I might say that if it violated the Trading with the Enemy Act—or, as the Supreme Court says, an agency—the boss over here—between a person not a resident of Germany and one who is a
3231 resident and a citizen of Germany would be a rational deduction—that is true. I mean to say where an agency of another one over here, an American with an agency in Germany, would end at the outbreak of war, that is not going to break down his control by virtue of this usufructuary interest.

You may be right, and I do not know whether you are right. You may be right, but I am inclined to think that, so far as bossing the company is concerned, I am not entitled to presume that after the outbreak of war; but on that usufructuary interest, I simply do not think that the declaration of war by the United States with Germany would break down Wilhelm's—

Mr. Gallagher: That is a different point that I won't labor with you.

The Court: That is right, but that very point would constitute the enemy taint and would constitute the right in rem that I am talking about in this conclusion of law. Do you see what I mean?

Mr. Gallagher: I know, and I am not trying to dissuade you, and I know you have made up your mind on that.

The Court: That is the heart of my decision, and I cannot believe it is wrong.

You see, one reason why I do not follow you on your Frima proposition as to title going out of him is that it is just as much to the interest of Wilhelm as to Fritz
3232 to go through that tax saving transaction through Frima. It is just as much to his interest, it saves

money for everybody, and he says, "Sure, I will let that colorful transaction of these shares and my interest in them—I will let that semblance of dealing with them—pass over to Frima," but that is not what we call a divesting of interest, any more than it was a divesting of interest by Fritz. He held his own interest in that.

Mr. Gallagher: That is where earlier we wanted to reopen to take testimony from Dr. Hoffacker and Dr. Kronstein. You found that Wilhelm and Marta, either through Frankenberg or otherwise, because they had a usufructuary, which you say is not a loss of right in rem, exercised control. There is no evidence of that in the record.

The Court: You have two types of control. That is what you want to get in mind. I think the Government ought to have it in mind, too. There are two types of control we are talking about. One control is a control which, I have found, according to the testimony of experts, existed simply by virtue of owning this usufructuary interest. That is one type.

Then there is another type. This may clear it up in your mind. There is another type of control that I had in mind when I said that I felt that Frankenberg had bossed the affairs over here and that Wilhelm had been
3233 consulted from time to time. I cannot think of anything more logical than one of those pieces of testimony that Mr. Houghland gave. There was one move there he was very anxious to make, and it was very obvious that he wanted to do it, and there was testimony of his having obtained the agreement of Fritz to do it, which was vetoed after it had been taken abroad, which was very indicative to me, from the meetings that they had, that it was that type of control.

I am talking there about a bossing, but the other control that I talk about is simply that of the usufructuary, and there is not anything in here that is inconsistent with that.

Mr. Gallagher: Which was actually exercised, as you find. There is nothing in there to find the exercise of that control unless you find Frankenberg exercising it for them.

The Court: You and I differ on one proposition, and, in my judgment, the usufructuary interest came into being by the turning over of the key and the putting up of that deposit that vested in the interest of Wilhelm. I think you can strike out your agent from that time over, so far as existence of that right is concerned. You do not.

Mr. Gallagher: I say, let's strike them out.

The Court: No, but I mean that could have happened and the right still exist. In other words, if we
3234 strike down your agency, once your right has vested and set up anyway—

Mr. Gallagher: You are pointing up the proposition Mr. Boland has discussed before—that that beneficial interest does not constitute taint.

The Court: I am not giving you taint there. It is one step in taint. That is a question, in my judgment, on ownership. I guess it is taint, too. I guess you are right.

I tell you, as long as I have not anything in here that is contrary to something that I found, I do not want to change it. I recognize your point. It is a right interesting point, and if the defendant were depending in this case only on the control by way of bossing, as I have put it for want of a better term or a more illustrative term—if they were depending on that alone—it would be a very strong case. I will be perfectly frank with you on it. In other words, it is something I can see the logic of and I would have to follow, and that is very reasonable.

Frankenberg is an American citizen now, isn't he?

Mr. Baum: Now he is, but he was not at the outbreak of war. He was a citizen of Haiti, which was not at war with Germany.

Mr. Gallagher: But he was a resident here and applied for citizenship in 1941.

3235 The Court: According to that decision—

Mr. Baum: The decision would therefore not apply, because it is between citizens of belligerent countries.

Mr. Gallagher: He is a resident, however.

The Court: It is perfectly obvious, though, Mr. Baum, that if you have an agency to boss affairs here in the United States—an agency of a foreign country—I am not talking about ownership now, because I agree with you on that—but if he had an agency over here to run these organizations—just like the insurance company—and war is declared with his principal—the country in which the principal exists—I think that is directly in point there. That would terminate that agency, in the absence of some testimony to the contrary.

Mr. Baum: I would respectfully say to you, Your Honor, that that is no longer the law. We have won at least six cases completely contrary to that case.

The Court: In the Supreme Court?

Mr. Baum: No, not in the Supreme Court.

The Court: That was a Supreme Court decision.

Mr. Baum: I realize that. It is a Civil War case. Things have changed a great deal.

The Court: I know that, but that is a reasonable proposition.

Mr. Baum: If Your Honor please, I submit it is
3236 not, for this reason. If a German had authorized an agent in the United States to boss his property, as you put it, to say that the Alien Property Custodian must prove that, after we were at war with Germany, and after we could not even communicate with Germany we must prove that the German, nevertheless, communicated with the agent and gave him new authority, would mean we would never vest a piece of property.

Mr. Gallagher: They can always vest. It is a question of keeping. We have argued that before.

Mr. Baum: It is very interesting.

The Court: I am not going to decide that, but I think that is a right interesting point.

Mr. Gallagher: I did not want to take it up later and perhaps find it is correct.

The Court: I commend you for that. I wish all the lawyers were as fair. Sometimes I get in the Court of Appeals and the point decided is one I have never heard of. I have had two happen in the last two years. I never heard about the point at all, and it was made in the Court of Appeals. I sent for the briefs on purpose. They had not argued it at all. There was not any mention made of it. But I do appreciate that.

I do not think there is anything in the wording there, Mr. Gallagher, that needs to be changed. In other words,

I do not think there is anything in here that is out of

3237 keeping with that opinion.

Mr. Gallagher: What is that, Your Honor?

The Court: I do not think there is anything in the conclusion of law that I have made that is out of keeping with that opinion of yours that you have just read.

Mr. Gallagher: Well, the only point that I can see—

The Court: For the reason that the usufruct, in my judgment, did exist, even though we concede that the outbreak of war stopped his agency.

Mr. Gallagher: Let us say it did, but that does not mean you exercise control because it exists.

The Court: It means you had control.

Mr. Gallagher: You say they exercised. It is a different thing to say you have control of a corporation than it is to say that you exercise control of a corporation. It seems to me you need more of an affirmative showing.

The Court: No. This says, "Subsequent to said gift agreement and pursuant to said usufruct"—

Mr. Gallagher: You say, "Wilhelm and Marta von Opel had possession of all of the shares of plaintiff and exercised direction and control," and presumably down to the time of vesting.

The Court: I did not say "down to the time of vesting."

Mr. Gallagher: I would presume that you meant down to the time of vesting unless you put down there some
3238 date in conclusion 3.

The Court: This is a conclusion of law. I do not want to make it a finding of fact. In other words, I find that they exercised control. Well, that really is a finding of fact, isn't it?

"Subsequent to said gift agreement and pursuant to said usufruct"—it is really co-possession.

Mr. Gallagher: Yes, Your Honor.

Mr. Baum: No, Your Honor.

The Court: What is that?

Mr. Baum: That is something Mr. Gallagher has been pounding away at for weeks. They did not have co-possession. Fritz von Opel testified that he gave Frankenberg the only key. You do not get into a safe deposit box without a key.

Mr. Gallagher: Who has co-possession now? If you are going to talk about that one key, the shares are in the name of Frima.

The Court: I was thinking about the question of law, though.

Mr. Gallagher: What is that, Your Honor?

The Court: I was thinking about the question of law.

Mr. Baum: I do not understand, Your Honor.

The Court: I am thinking about it as a question of law. This is not a finding of fact. I do not know whether you need 4.

3239 Mr. Baum: 5 does not make any sense without 4, Your Honor.

The Court: You do not need to say. You do not need much in there.

Mr. Baum: The reason I think we need 4, Your Honor, is because it is a two-step argument. If you say the corporation is enemy tainted and the taint it shown through Wilhelm and Marta, that is part of the conclusion.

The Court: Wait just a minute, You have this as strong as you need it, in my judgment. You cover that in your next one, don't you? You have got that.

Let us take out 4 and make it "the possession and control of the outstanding shares." You do not need any finding on that. You are not limiting that a bit.

The possession is what you talk about in your preamble in your findings of fact, and then you have got that supplemented. I do not know whether you have everything in there that I have found. I do not think it makes a lot of difference, because they are all in there. The nativity of his sister might have something to do with it. Really, the conclusion is that as of the time of vesting of the shares of plaintiff corporation, they were enemy tainted.

That is all you need, and the less you say about it, the better off you are about it on your conclusions of law, because you have my opinion telling my views about it.

3240 I would make that very simple.

Your usufruct is all right. 1, 2, and 3, are all right. But I think I would cut out 4, 5, and 6, and just substitute a finding that as of the time of vesting of the securities held by plaintiff corporation, they were enemy tainted within the meaning of so and so.

Mr. Baum: I think that would make it too general, Your Honor.

The Court: You are a whole lot better off. If you make it specific, then I have got to write everything in there. I mean, I have got to write an argument in there. You do not want to write an argument in there. The more general it is, the better it is.

Mr. Laufer is nodding his head up and down; he agrees with me.

Mr. Baum: I do not think he does.

The Court: I think he does.

The principal thing you want in the conclusion of law is that the decision is in favor of the defendant. That is the principal one.

Mr. Baum: Yes, but also, as you recall the final argument, you said it is up to me, paraphrasing the language, to decide what the Supreme Court meant by enemy taint. We think conclusion 4 shows what is meant.

The Court: That is a summation of it, that is
3241 true, but it is really in my opinion. I would rather you copy the language of my opinion, because you have left out the sister's reversionary interest, which is an item.

Mr. Baum: Those are items which are set out in your findings of fact.

The Court: That is right, but you are cutting it out of here. I think you are much better off if you make it general. You are tying me down, and I do not want to be tied down on that proposition, either rightly or wrongly. I might as well meet that squarely. I think I am perfectly right about it. The Court of Appeals may think differently, but I think I am perfectly right about it.

You have in your preamble—you have in your findings of fact—Fritz' birth, Fritz' activities and sports. I think you have that in there. You have got his visits. You have got his sister's nativity. You have the mother and father having lived there all their lives and being enemies, and von Opel's name was famous in Germany. You have all of that.

In addition to that, you have my opinion summarizing all that out, and all you have to say in your conclusions of law is that the circumstances, the ownership of the vested securities and the interest of the various parties involved, constitute enemy taint within the meaning of so and so.

Now, you have got the benefit of my views and
3242 argument by my opinion. You have all the salient facts in there. That is my better than summarizing my facts now. Do you see what I mean?

Mr. Baum: Would you mind repeating what you just said?

The Court: You think that over. I am not terribly wedded to the idea, but I have had a lot of experience with conclusions of law, and you do not need a whole lot on this. The thing you need is your findings of fact, and my arguments by way of opinion will be pointed up a whole lot by your arguments and brief.

What I do not want to do, and what I do not like to do here, is to limit, as I think you have done here, my conclusions to certain propositions that are not in there.

If you gentlemen are right in this, you win your case; but if you happen to be wrong and I happen to be right, by considering these others you might have a little bit of an argument there: "Judge Laws put down his opinion."

Mr. Baum: I see your point.

The Court: You will never go wrong in generalities on findings of law.

Mr. Baum: I hope not.

The Court: The time you go right is in your findings of fact.

We will leave 1, 2, and 3 as they are and then substitute for 4, 5, and 6 language substantially to this effect.

3243 You can write all of this up, in case I have overlooked something.

Just put it that the circumstances of the ownership and control of the securities vested by the Alien Property Custodian constitute enemy taint, which the Supreme Court of the United States has decided bars recovery under the Trading with the Enemy Act. They did not define it, but they said it bars recovery. That ownership will get in everything that I have said, in my opinion. That will get the reversionary interest, it will get Fritz' mother's and father's—

Mr. Baum: It does not get in the bauxite.

The Court: Ownership and control? That is right. Maybe I should not strike out 6.

Mr. Baum: I think possibly the remedy is to write this in place of 5 and leave 6 in there.

The Court: And leave 6 in there, starting out with, "Plaintiff's ownership of Transdanubia."

Make this number 5, then:

"Plaintiff's ownership of Transdanubia Bauxit, A. G., which mined bauxite for the benefit of Germany, is further evidence of enemy taint within the meaning of Section 2 of the Trading with the Enemy Act, and taken in conjunction with the ownership and control defined in the preceding paragraph, bars recovery of the vested secu-
3244 rities."

That will get rid of a lot of what you want.

Mr. Baum: That also eliminates the circumstances about Fritz' citizenship.

The Court: Oh, yes. We can leave 6, starting that way.

Mr. Baum: That is what I would suggest.

The Court: We can leave 6 about like it was.

Let us put that in the beginning. Put right ahead of what I dictated:

"The circumstances of the acquisition of Fritz von Opel's Liechtenstein citizenship and his attachment to and sympathy for Germany," and then go ahead with what I dictated.

I think I can get that now.

What about your orders? Have you drawn that?

Mr. Baum: I had submitted that to Your Honor early in March.

The Court: Have you seen that?

Mr. Gallagher: It was a long time ago. I do not recollect it.

The Court: You can rewrite this thing. Give it to Mr. Gallagher. I would like my law clerk to correct this opinion.

How should I handle that opinion proposition?
3245 Should I substitute it?

Mr. Gallagher: I think you should substitute this for the other.

The Court: Is that proper?

Mr. Baum: I think so.

The Court: Otherwise I would have to say, "The following is hereby substituted," and rewrite the whole thing.

Would you rather have me write it or would you do it?

Mr. Baum: I can undertake it.

The Court: I think I can do it.

Mr. Baum: It is just a mechanical difficulty. Some of the corrections on the findings—

The Court: All I need to do on this finding is this. Here is the judgment, now. It is not a dismissal.

Mr. Baum: That was on the basis of your opinion.

The Court: You leave this with me, then.

You pick up Monday morning, in my office, these notes, and by then I will have taken out of there the corrections I want made in the opinion. Then you rewrite the findings of fact the way I have marked them. Give Mr. Gallagher a copy, and then rewrite the judgment.

You give me a copy and each side a copy of what I dictated there, and then we can try to get it out next week, about Wednesday.

(At 12 noon the hearing was concluded.)

* * * * *

3248 PROCEEDINGS

The Deputy Clerk: Uebersee Finanz vs. Tom C. Clark.

Mr. Gallagher: May it please the Court, with respect to the plaintiff's motion for new trial, it is not my intention to labor Your Honor. Our motion sets forth the basis for

the motion probably much more succinctly than I could state it orally.

As we have pointed out in the motion, the existence of Miss Firnhammer did not come to our attention as counsel until after this trial had concluded. The existence of her testimony did not come to the attention of either counsel or Mr. or Mrs. von Opel, Mr. von Opel being, as the Court well recollects, majority shareholder in the plaintiff corporation.

It seems to counsel for the plaintiff that Miss Firnhammer's testimony has considerable significance when read in the light of Your Honor's opinion and finding, which is to the effect that while Mr. Wilhelm von Opel discussed the question of a waiver with Dr. Daniel Gros in the year 1935 or thereabouts, he never did waive his Niessbrauch by any statement or act.

The statements of Mr. Wilhelm von Opel, Miss Firnhammer states, were made to her during the years 1935, 1936, and particularly in the year 1937, which is after plaintiff's exhibits 96 through 101 had been written and addressed to Director Wilhelm of the Reichbank; and Your
3249 Honor will recollect the testimony of Director Wilhelm, which is in the record in this case, indicated that he advised Gros that the Reichbank felt that it could take no steps to endeavor to have any of the income from the alleged niessbrauch returned to the Reich.

Miss Firnhammer's testimony, I concede, is in a sense cumulative, and I am well aware of the rule that testimony which is merely cumulative or corroborative is insufficient for predicating a motion for a new trial. In this case, however, proceeding in equity, it seems to counsel for the plaintiff that her testimony—when added to the testimony of Dr. Gros; Fritz von Opel, the father, wherein he stated that he never wanted to have anything to do with the niessbrauch, that the only purpose was for protection in case of need; the testimony of Director Wilhelm that Dr. Gros did

come to see him on repeated occasions over a period of 2-odd years; the exhibits which have been introduced; the letters corroborating the fact that the matter was taken up with the Reichbank; and the fact that we are dealing here with the property of a neutral corporation; and, on a strictly one-premise question of law basically, namely, that of enemy taint, have determined that this plaintiff corporation is not entitled to get its property back and thereby have confiscated it in effect—it would appear that this testimony as to the waiver should move this Court, acting in
3250 equity, to grant plaintiff's motion.

Your Honor will also recollect, as is set forth in the plaintiff's memorandum in support of the motion, that we set forth there testimony given by Mr. Fritz von Opel in the year 1946, prior to the time that Wilhelm von Opel's testimony was taken in Wiesbaden, in which Mr. von Opel stated that his father had renounced all claims against him and the niessbrauch, and the defendant was well aware of this fact, having taken this testimony and its being taken at their request before they proceeded to Wiesbaden to query Wilhelm and Marta and the others.

During the course of the proceedings in Wiesbaden, as is evident from the affidavits of Dr. Henry Kronstein and Mr. Richard Connor, Mr. Wilhelm von Opel was present during the taking of the testimony. He was present during the taking of the testimony of Dr. Daniel Gros, the author of the letters to the Reichbank. If, as we point out in our motion and memorandum in support thereof, the defendant thought there was anything fabricated, specious, false, or otherwise with respect to that testimony, they had ample opportunity to have questioned Mr. Wilhelm von Opel at that time.

Plaintiff's counsel, Mr. Richard Connor, did query Gros about these letters in detail. His deposition testimony was not introduced, in view of the fact that he was present here

in the court as a witness, and Your Honor will recol-
3251 lect he testified with respect to each of those exhibits. The father had told him he wanted nothing to do with it, and Gros' job was to take it up with the Reichbank to see that it was washed out and that the father would be under no further peril or action on the part of the Nazi government.

So for all those reasons, and particularly since the defendant has repeatedly endeavored to make moment of the fact that neither Wilhelm nor Marta was specifically asked about the waiver, we feel that equity demands that Miss Firnhammer be heard from; and further, as we pray in our motion, that Your Honor, if he were to hear from Miss Firnhammer, permit us to bring Mrs. Marta von Opel here so that she herself could now testify with respect to the waiver.

That is all, Your Honor.

Mr. Baum: If Your Honor please, I will try to be equally brief, but I think certain facts must be pointed out which Mr. Gallagher has not made clear.

In the first place, Mr. Gallagher seems to premise his presentation to Your Honor on a request for an exercise of discretion. It is the defendant's view that there is little room left for Your Honor's discretion in this matter, for several reasons. In the first place, we strongly contend that this testimony of Miss Firnhammer is inadmissible and would not be ground for a motion for a new trial in any event. She says that she heard Wilhelm von Opel
3252 say that he no longer had any claims against his son. Those are clearly hearsay declarations.

The plaintiff says that those declarations are against interest, but I call Your Honor's attention to Miss Firnhammer's affidavit, in which she herself says, quoting Wilhelm von Opel, or at least paraphrasing him, that the best way out was to explain to the authorities what his intentions had been from the beginning, namely, that he had

only wanted protection in case of need and that he did not want to have any claims against his son because they would involve him in the strict regulations with regard to foreign currency.

In that context those are only self-serving declarations. Mr. Wilhelm von Opel, as this very affidavit shows, was being bothered by the German authorities to bring in foreign exchange arising out of this usufruct, so for him the best way was to say he had no usufruct.

In fact, this affidavit states above: "He was afraid that the Nazi might use what we called the Niessbrauch provision of the gift agreement to jump on him anew year after year."

Therefore, these statements were nothing more than efforts by Wilhelm von Opel to get himself out of trouble with the Government, and those are not declarations against interest. When the German authorities were after him and he was trying to get out of trouble, he was not mak-
3238 ing declarations against his own interest.

But beyond that, I think Mr. Gallagher adverted to a very important point on this motion. As we have set forth in our memoranda, the courts have stated that there are five requirements which must be met in order for the court to grant a motion for a new trial as here filed. These are that the evidence must be newly discovered evidence; that due diligence to discover it must have been shown; that the evidence must not have been cumulative or corroborative; that the evidence be material; and that there be a probability that it would lead to a different result.

We say that none of these requirements has been met here, even assuming that these declarations would be admissible.

In the first place, we say it is not newly discovered, for this very simple reason. Attached to the Defendant's answering memorandum is a statement from Miss Firnhammer which was obtained from an agent of the Fed-

eral Bureau of Investigation, in which she states that Fritz von Opel came to her right after Your Honor's opinion was handed down and asked her what she knew about this case, and she further states, in the very same statement, that, from the manner in which Fritz von Opel questioned her, she knew that he knew that she was aware of the nature of the case, but did not know the exact extent of her knowledge.

3254 I submit that that shows at least knowledge on the part of Fritz von Opel, who can well be deemed the representative of the plaintiff, that there was a witness who had knowledge of material facts in this action, but who waited until after they had lost the case, as a result of Your Honor's opinion, and then came along and looked for additional witnesses. That is not the way to establish a basis for a motion for newly discovered evidence.

I would like to point out to Your Honor in that connection that that very statement of Miss Firnhammer which was obtained by the defendant is contrary to the allegations of the moving papers themselves. The moving papers contained a double hearsay statement by plaintiff's counsel that Fritz von Opel told them that Margot von Opel had spoken to Miss Firnhammer, whereas the true story, from Miss Firnhammer's mouth, seems to be that Fritz von Opel came running after her as soon as Your Honor's opinion had been filed and read.

Furthermore, Miss Firnhammer, in the affidavit which plaintiffs have submitted, says that she took the place of a daughter, with respect to Mr. and Mrs. von Opel, after their own daughter had run away to Switzerland.

It seems to me, and I believe it should to the Court, that it is somewhat incredulous to believe that no one thought of asking a person who was on such intimate terms with Wilhelm von Opel and Marta von Opel, whether

3255 she knew anything about this case before they came to trial; and I think that the failure to ask her, if

there was a failure, was certainly a showing of lack of due diligence in preparation for the case for trial; and that seems to be what is inherent in this motion.

Furthermore, Mr. Gallagher admits that the testimony is cumulative or corroborative. I would like to point out just how strong that is to Your Honor, by virtue of the two cases which we have cited in our memorandum.

There was the Woolworth case, which is cited on page 8 of our memorandum, which was a negligence action. After judgment was rendered, a motion was made for a new trial on the ground that evidence had been discovered as to the identity of the shoes which the plaintiff had been wearing at the time of the accident. Testimony as to those shoes had also been adduced at the trial. The Court denied the motion, and the denial was sustained by the Fifth Circuit Court of Appeals, on the ground that this was an issue which had been litigated and that a motion for a new trial is not a basis for relitigating old issues.

Then I also call Your Honor's attention to the Prisament case, which was a criminal prosecution for larceny, and it was alleged to have occurred in Georgia. The defendant produced evidence at the trial by witnesses, who testified

3256 that he had been seen in New York City on the date of the alleged larceny. He was nevertheless convicted, and he then filed a motion for a new trial on the ground that he had found additional witnesses who would testify that he was in New York City on this day of the larceny. The Court specifically overruled the motion, saying that that was not proper ground for a motion. It would merely add to evidence which was in the record, and it had nothing new. It was merely cumulative and corroborative of evidence previously introduced.

That is exactly what we have here. Fritz von Opel took the stand, as Your Honor well remembers, and for the first time we heard testimony in this case that there was a waiver in 1935, at the very time when the Gold Case was pending in the United States courts.

Dr. Gfos took the stand and said the same thing.

They produced documents which they claim showed waiver.

Then that is where it stops.

We produced evidence to the contrary. We produced the testimony of Mr. Houghland and Mr. Crittenden as to declarations and admissions which were inconsistent with the waiver; and that issue has been fully litigated from the very beginning.

It seems to me that certainly there is far less room for the exercise of the Court's discretion in a case such as this than there was in a criminal prosecution, where certainly the Court is even more zealous not to deprive a per-
3257 son of liberty if there be any ground for avoiding it.

So I submit, Your Honor, that the evidence is purely cumulative and corroborative and there is no basis for this motion.

There are just one or two further points I would like to make. Mr. Gallagher in his papers, and again today, has stated to Your Honor that at the time of the taking of the deposition in Wiesbaden the defendant's counsel did not ask Wilhelm and Marta von Opel about any waiver. I think that is a very interesting point. We were cross examining the man whom we claimed to be the real owner of this property. He testified that he did not own the property, that he had nothing to do with it, that he never had any usufruct.

Yet the plaintiff, who has the burden of proof in this case to show non-enemy taint, never asked him whether he had ever waived any usufruct; and they now say that it was our duty to ask Wilhelm and Marta von Opel whether he had waived. To me that is synonymous to expecting the United States attorney to ask a defendant, "You did not commit the crime, did you?" I think that is all it amounts to.

Then in the affidavit of Dr. Kronstein and in the affidavit of Mr. Connor, who was then taking the deposition as counsel for the plaintiff, the incredible statements are made that they did not think it necessary to ask Wilhelm von Opel as to whether he had waived or not. To me,
3258 Your Honor, that is completely ridiculous. You certainly would think it necessary to ask the persons who were the alleged holders of a usufruct whether they had waived it or not and not expect to come into court and prove a waiver by purely secondary evidence.

Now they come in and they say, "Wilhelm von Opel is dead. We can't get his testimony any more. We will give you hearsay testimony as to whether he waived it or not." And that is what the result leads to.

Furthermore, the evidence which is contained in Miss Firnhammer's affidavit, as Mr. Gallagher apparently very well recognizes, does not relate at all to any waiver by Marta von Opel. Marta von Opel, as Your Honor will recall, also held the usufruct. It was held by both, but thi proposed witness would only testify as to a waiver by Wilhelm.

Plaintiff's answer to that is that the Court well knows that Wilhelm managed everything on behalf of his wife. There is no such testimony in this record, nor is there any testimony that, under German law or any other law, Wilhelm von Opel could waive a property right, an in rem right, belonging to his wife. In fact, that is not the law.

So that I submit, Your Honor, that even if this testimony were admitted, there would still be a failure to show that Marta von Opel had ever relinquished anything.

As to the prayer for reopening this case for allow-
3259 ing the testimony of Marta von Opel, I see no basis upon which that can be raised at all. Certainly that is not newly discovered evidence. There is no claim that it is subsequent, and no claim could be made. All that it can be is that there was neglect in the preparation of the

case, and I submit, Your Honor, that that is the basis of this motion.

I should also like to call Your Honor's attention to this deposition in Wiesbaden, to which plaintiff has referred. There is not one word in this deposition, by Wilhelm von Opel, Marta von Opel, or Daniel Gros, to the effect that Wilhelm von Opel or Marta von Opel ever waived their usufruct. The closest you come to it is in the testimony of Daniel Gros, in which he says, "I advised Wilhelm von Opel that the only thing for him to do was to abandon his usufruct." That is not testimony as to waiver.

The exhibits to which the plaintiffs referred are also interesting, since three of them mention no waiver at all. One of them refers to a waiver which is to be written up in the future, and the other two are memoranda submitted by Daniel Gros to the German authorities, in 1936, the year after the waiver was alleged to have been made, in which he asks the authorities to find as a fact that there is a claim in existence against the son.

I submit, Your Honor, that on the basis of all this there has been a complete failure of meeting the heavy
3260 burden which is imposed upon the plaintiff in order to secure a new trial after a lengthy and protracted one such as we have had.

Your Honor will well remember your comment to Mr. Gallagher last March, when he mentioned filing a motion for a new trial, in which you said, "You had better labor pretty hard as to why you could not get it before you tried this case." I think that ruling holds.

Mr. Gallagher: I have nothing to say, Your Honor.

* * * * *